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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DANIEL MANUEL BELMUDES, Defendant and Appellant.	B147885 (Super. Ct. No. KA049097)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert C. Gustaveson, Judge. (Retired judge of the L.A. Sup. Ct., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part; reversed in part with directions.

Shawn O'Laughlin, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Robert F. Katz, Supervising Deputy Attorney General, and Karla Cottis, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts III.C. and III.D. in their entirety.

I. INTRODUCTION

Defendant, Danny Manuel Belmudes, appeals from his convictions for second degree robbery (Pen. Code,[1] § 211) and attempted robbery (§§ 664, 211) and the finding a section 186.22, subdivision (b)(1) gang allegation was true as to both counts. Defendant argues: sentencing error occurred in connection with the section 186.22 gang enhancement as to count 2; there was insufficient evidence to support the finding as to both gang enhancements; and there was instructional error.

In the published portion of this opinion, we address defendant's sentencing arguments as to the 10-year section 186.22, subdivision (b)(1) gang enhancement which was ordered to run concurrently as to count 2. We conclude that the 10-year enhancement in section 186.22, subdivision (b)(1) may not apply to an *attempted* robbery conviction because it is not a violent felony within the meaning of section 667.5, subdivision (b)(1). Furthermore, we conclude a section 186.22 enhancement may not be ordered to run concurrently as was done here. We remand for resentencing on the count 2 gang enhancement but otherwise affirm the judgment.

II. FACTURAL AND PROCEDURAL BACKGROUND

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) On July 8, 2000, Rodolfo Venegas

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1 All further statutory references are to the Penal Code unless otherwise indicated.

Sandoval along with his uncle, Alejandro Sandoval, and a cousin, Alberto Sandoval, were walking in Pomona at approximately 11 p.m. Defendant, Alex Garcia, and Esteban Guardardo, who were riding bicycles, confronted the Sandovals. Mr. Guardardo approached Alberto.[2] Mr. Garcia approached Alejandro, demanding money. Alejandro initially said he had no money. However, Mr. Garcia's hand was near his waist. Seeing this, Alejandro gave Mr. Garcia $100. Defendant simultaneously approached Rodolfo. Defendant had his hand behind his back. Rodolfo believed defendant might have a weapon. Defendant told Rodolfo, "'Give [defendant his] money." Rodolfo said he had no money. Defendant tried search Rodolfo's pocket. Nothing was taken from Rodolfo. Alejandro saw a passing police car and then signaled to the officers.

Pomona Police Officer Dennis Cooper saw Rodolfo waving. Officer Cooper saw three "cholo gang members" circling two Hispanic men. Officer Cooper recognized defendant, Mr. Garcia, and Mr. Guardardo from prior contacts with them. As Officer Cooper made a u-turn, defendant and Mr. Garcia fled on their bicycles. Mr. Guardardo fled on foot. Officer Cooper's partner, Officer John Edson, drove after the three robbers. Officer Edson chased Mr. Garcia over a fence. Mr. Garcia was then arrested. Officer Mark McCann subsequently detained defendant and Mr. Guardardo. Officer McCann believed defendant and Mr. Guardardo belonged to the same gang. The victims identified defendant, Mr. Garcia, and Mr. Guardardo shortly thereafter at a nearby park.

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[2] For purposes of clarity and not out of any disrespect, the Sandoval victims will be referred to by their first names.

Detective Hector Rodriguez, an experienced investigator familiar with gangs in the Pomona area, knew defendant. Detective Rodriguez testified defendant was a very active member of one of the most violent gangs in Pomona. Defendant's tattoos also identified him as a member of the gang. Defendant had previously admitted that he was a member of the gang. Photographic evidence was also shown to Detective Rodriguez at trial. Defendant was depicted in the photographs with other gang members. Defendant was forming the numbers of the gang with his fingers. Mr. Garcia was an associate of the same gang. Another investigator told Detective Rodriguez that Mr. Guardardo was also an active member of the gang. Detective Rodriguez was familiar with the conviction of Daniel Duenas in 1997. Mr. Duenas, who was a member of the same gang as defendant, was convicted of assault with a firearm on a police officer. Detective Rodriguez believed that Mr. Duenas's conduct was for the benefit of defendant's gang. Detective Rodriguez was also familiar with the 1997 conviction of Julio Felix for robbery and assault with a deadly weapon. Detective Rodriguez believed Mr. Felix's crime was also committed for the benefit of defendant's gang. Detective Rodriguez was also aware that another gang member, Eddie Marques, killed someone a few years earlier in the area where the robbery occurred in this case. Detective Rodriguez believed the crime defendant committed was for the benefit of and at the direction of the gang. Detective Rodriguez believed the crime was committed with the specific intent to promote, further, and assist criminal conduct by gang members. The crime occurred in an area claimed by the gang to which defendant belonged. Detective Rodriguez believed gang members would approach any strangers who entered that area. The gang members had preyed on some undocumented

workers in the past. (Alejandro and Alberto were living in Mexico at the time of trial.) Alejandro's testimony given at the preliminary hearing was read to the jury. Rodolfo testified through the assistance of an interpreter.

As to the probation and sentencing hearing, the trial court indicated that it intended to impose a total term of 15 years, 8 months. As to count 1, defendant had been convicted of second-degree robbery. The court found the following aggravating circumstances: defendant was the leader of younger accomplices; the offense was premeditated; and defendant had a substantial prior record albeit involving juvenile matters and misdemeanors. The trial court did not find any mitigating circumstances. As a result, the court imposed the high term of 5 years for second degree robbery plus 10 years for the section 186.22, subdivision (b)(1) gang finding. As to count 2, pursuant to section 1170.1, subdivision (a), the court imposed one-third of the midterm or eight months for the attempted robbery of Rudolfo. Additionally, the trial court purported to impose as a concurrent sentence the count 2 section 186.22 gang enhancement, one-third of the 10-year term of 3 years, 4 months. In other words, the trial court ordered the section 186.22 three-year, four-month term to run concurrently with the remaining fifteen-year, eight-month determinate term imposed for the robbery and attempted robbery of the Sandovals. The trial court did not orally state on the record any basis for imposing the concurrent sentence on the section 186.22 gang enhancement nor were its reasons set forth in the court's minutes as to this aspect of the sentencing decision. Additionally, defendant had previously been sentenced in three misdemeanor matters.

The trial court ordered the 15-year, 8-month term in the present felony case to run consecutively to the 3 misdemeanor sentences.

III. DISCUSSION

A. The Concurrent Term Imposed On The Count 2 Section 186.22 Gang Enhancement

We asked the parties to brief the question of whether a concurrent 10-year term could be imposed on the count 2 section 186.22, subdivision (b)(1) gang enhancement. The Attorney General argues that a concurrent term may not be imposed on a section 186.22, subdivision (b)(1) gang enhancement. We agree.

Section 186.22, subdivisions (a) and (d) provide for separate offenses involving specified gang activity. Section 186.22, subdivision (b) provides for enhanced determinate and indeterminate felony sentences. Section 186.22, subdivision (b)(1) states in its entirety: "Except as provided in paragraph (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, *shall*, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of two, three, or four years at the court's discretion, except that if the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person *shall* be punished by an additional term of five years. If the felony is a violent felony, as defined in subdivision (c) of Section 667.5,

the person *shall* be punished by an additional term of 10 years." (Italics added.) Section 186.22, subdivision (b)(3), states as to the three possible terms of incarceration listed in the first sentence of section 186.22, subdivision (b)(1), "The court *shall* order the imposition of the middle term of the sentence enhancement, unless there are circumstances in aggravation or mitigation. . . ." (Italics added.) Section 186.22, subdivision (b)(4) states in pertinent part when an indeterminate term may be imposed as follows: "Any person who is convicted of a felony enumerated in this paragraph committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, *shall*, upon conviction of that felony, be sentenced to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of . . . ." (Italics added.) As can be noted, subject to the power to strike, the enhancement or enhanced sentencing language in section 186.22, subdivisions (b)(1), (b)(3), and (b)(4) and (c) uses the word "shall" when describing a trial judge's duties in imposing sentence in a gang case.

Of further consequence is the language in section 1170.1, subdivision (a) which relates to consecutive sentencing in cases involving determinate terms. Section 1170.1, subdivision (a) describes the subordinate term that is imposed for a consecutive offense as follows, ". . . The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and *shall* include a one-third of the term imposed for any specific enhancements applicable to those subordinate

offenses." (Italics added.) Moreover, section 1170.1, subdivision (d) contains the following mandatory language concerning whether an enhancement must be imposed, "When the court imposes a prison sentence for a felony pursuant to Section 1170, the court *shall* also impose the additional terms provided for any applicable enhancements. . . ." (Italics added.) As can be noted, the language in the relevant sentencing statutes is cast in terms of a mandatory duty to impose a sentence on an enhancement, subject to any statutory authority to strike the additional term.

Subject to the power to strike an additional punishment, similar language in other enhancements has been held to impose a mandatory duty on a trial judge to impose the specified sentence. (*People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6 [§ 667, subd. (a) five-year prior conviction enhancement]; *People v. Ledesma* (1997) 16 Cal.4th 90, 96-102 [§ 12022.5, subd. (d) firearm use enhancement]; *People v. Nasalga* (1996) 12 Cal.4th 784, 798, fn. 12 (lead opn. of Werdegar J.) [§ 12022.6 excessive taking enhancement]; *People v. Coronado* (1995) 12 Cal.4th 145, 151 [§ 667.5 prior prison term enhancement]; *People v. Beltran* (2000) 82 Cal.App.4th 693, 696 [§ 12022.7 great bodily injury enhancement]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 414 [§ 667.8 kidnapping enhancement]; *People v. Hernandez* (1993) 18 Cal.App.4th 1840, 1841-1842 [Health & Saf. Code, § 11353.1, subd. (a) enhancement for giving a controlled substance to a minor who is at least four years younger than the defendant]; *People v. Harvey* (1991) 233 Cal.App.3d 1206, 1229-1230 [Health and Saf. Code, § 11370.4, subd. (a) drug enhancement]; *People v. Garrett* (1991) 231 Cal.App.3d 1524, 1528 [§ 12022.1, subd. (b) enhancement for committing a felony while on bail for another felony offense].)

Further, it is inappropriate to impose a sentence on an enhancement but not on the underlying offense. (*People v. McFarland* (1989) 47 Cal.3d 798, 802, fn. 6; *People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1309-1311; *People v. Schulz* (1992) 5 Cal.App.4th 563, 569, fn. 16; *People v. Smith* (1985) 163 Cal.App.3d 908, 913-914.) Similarly, a sentencing judge has no authority to impose less than the legislatively specified duration of the enhancement. (*People v. Harvey, supra*, 233 Cal.App.3d at pp. 1229-1230.) Accordingly, a section 186.22, subdivision (b)(1) gang enhancement may not be ordered to run concurrently if the underlying offense is to be served consecutively.

However, we agree with defendant that he is entitled to a limited remand to allow the trial court to determine whether it wishes to strike the additional prison term as permitted by section 186.22, subdivision (g) which states, "Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition." Typically, when a legally unauthorized sentence is imposed, it is appropriate to remand the cause to the trial court to allow it to exercise its sentencing discretion in a jurisdictionally correct fashion. (*People v. Bradley* (1998) 64 Cal.App.4th 386, 390-391; *People v. Irvin* (1991) 230 Cal.App.3d 180, 192-193.) It is therefore appropriate to allow the trial court to exercise its discretion pursuant to section 186.22, subdivision (g).

B. The Propriety Of The Potential 10-Year Enhancement On The Subordinate Term

As noted previously, the trial court found that on the attempted robbery count a 10-year enhancement could be imposed pursuant to section 186.22, subdivision (b)(1). In compliance with section 1170.1, subdivision (a), the trial court then determined that the 10-year gang enhancement on the subordinate attempted robbery count should be reduced to one-third of that term or 3 years, 4 months. We have already noted that the trial court should not have ordered the gang enhancement on count 2 to be served concurrently. Further, we have remanded the matter to allow the trial court to exercise its discretion pursuant to section 186.22, subdivision (g). The question remains though as to whether on remand defendant will be subject to a 10-year term reduced by one-third pursuant to section 1170.1, subdivision (a) or some other maximum period of incarceration on the section 186.22, subdivision (b)(1) gang enhancement.

We conclude that defendant may not be subject to a 10-year term reduced pursuant to section 1170.1, subdivision (a). Rather, on remand, all defendant will be subject to is a five-year potential term which must be reduced in compliance with section 1170.1, subdivision (a). As noted previously, section 186.22, subdivision (b)(1) states in part, "[I]f the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years. If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years." The apparent reason that the trial court imposed one-third of the 10-year term was its determination, made with the full acquiescence of defense

counsel and the prosecutor, that attempted robbery is a violent felony. The listing of the relevant violent felonies in section 667.5, subdivision (c) is as follows: "(c) For the purpose of this section, 'violent felony' shall mean any of the following: [¶] . . . [¶] (9) Any robbery." There is nothing in the language of section 667.5, subdivision (c) which indicates that *attempted* robbery is a violent felony. Unless otherwise specified, an attempt to commit an enumerated felony does not fall within the scope of section 667.5, subdivision (c). (*People v. Ibarra* (1982) 134 Cal.App.3d 413, 425; see *People v. Finley* (1994) 26 Cal.App.4th 454, 458.) Additionally, unless an attempt to commit a specified crime is listed, other enhancing statutes based on the commission of enumerated felonies do not apply if the offense is not completed. (*Id.* at pp. 458-459 [recidivist provision in § 314]; *People v. Le* (1984) 154 Cal.App.3d 1, 10-11 [enhancement pursuant to § 667.6, subdivision (c) inapplicable to *attempted* forcible oral population because an attempt to commit the offense is not listed in the statute]; *People v. White* (1987) 188 Cal.App.3d 1128, 1138, overruled on another point in *People v. Wims* (1995) 10 Cal.4th 293, 314, fn. 9 [§ 667.8 inapplicable because *attempted* rape not listed therein].) However, attempted robbery is a serious felony. (§ 1192.7, subds. (c) (19) & (39).) Hence, on remand, defendant will be subject to a maximum five-year term for the section 186.22, subdivision (b)(1) gang enhancement which must be reduced pursuant to section 1170.1, subdivision (a).

[Parts III.C. and an III.D. are deleted from publication.
See *post* at page 17 where publication is to resume]

C. Sufficiency Of The Evidence To Support The Gang Enhancements

Defendant argues there was insufficient evidence to support the section 186.22, subdivision (b)(1) finding. In reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia, supra,* 443 U.S. at p. 319; *People v. Osband, supra,* 13 Cal.4th at p. 690; *Taylor v. Stainer, supra,* 31 F.3d at pp. 908-909.) Our sole function is to determine if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia, supra,* 443 U.S. at p. 319; *People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Marshall* (1997) 15 Cal.4th 1, 33-34; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The Supreme Court has held, "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin, supra,* 18 Cal.4th at pp. 331-332, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Section 186.22, subdivision (b)(1) provides: "[A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term . . . ." Defendant argues,

"[T]he only evidence the state presented to show that this crime was 'gang related' was the opinion testimony of gang expert Hector Rodriguez." The California Supreme Court recently interpreted this portion of the California Street Terrorism Enforcement and Prevention Act of 1988: "Evidence of past or present conduct by gang members involving the commission of one or more of the statutorily enumerated crimes is relevant in determining the group's primary activities. Both past and present offenses have some tendency in reason to show the group's primary activity (see Evid. Code, § 210) and therefore fall within the general rule of admissibility (*id.* at § 351). . . ." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) The *Sengpadychith* court concluded: "Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute [§ 186.22, subd. (e)]. Also sufficient might be expert testimony, as occurred in [*People v.*] *Gardeley* [(1996)] 14 Cal.4th 605. . . ." (*People v. Sengpadychith, supra,* 26 Cal.4th at p. 324, original italics.)

In *Gardeley,* a San Jose Police Department detective testified that the gang of which the defendant had been a member engaged in the sales of narcotics and witness intimidation. The detective had personally investigated "hundreds of crimes committed by gang members." The detective gathered information from conversations with gang members as well as San Jose Police Department employees and other law enforcement agencies. (*People v. Gardeley, supra,* 14 Cal.4th at p. 620.) Opinion testimony of the type presented in *Gardeley* may constitute evidence sufficient to support a section 186.22 finding. (*People v. Sengpadychith, supra,* 26 Cal.4th at p. 324.)

In this case, Detective Rodriguez had been assigned to the gang unit and the major crimes task force. In these assignments, Detective Rodriguez's primary responsibilities involved gangs in the City of Pomona. He was familiar with gang paraphernalia and photographs. Detective Rodriguez participated in numerous parole and probation searches of gang members' homes. He also spoke with many members of the 16 various gangs in Pomona. Defendant belonged to the largest, most active, and most violent gang in Pomona. Detective Rodriguez had testified in court and before the grand jury regarding this gang and its members. Detective Rodriguez testified in this trial regarding past felony convictions of members of this gang. Finally, he believed the robbery and attempted robbery in this case were committed at the direction of the gang, for the promotion of and assistance of criminal conduct by its members. The facts of the present case coupled with Detective Rodriguez's fact specific opinion and the evidence of past criminal activities constituted substantial evidence to support the implied finding the crimes were committed to promote gang activities. (*People v. Sengpadychith*, *supra*, 26 Cal.4th at pp. 322-324; *People v. Gardeley*, *supra*, 14 Cal.4th at pp. 624-626.)

D. CALJIC NO. 17.41.1

Defendant argues that the trial court improperly instructed the jury with CALJIC No. 17.41.1, which violated his constitutional rights to due process and a fair jury trial by: undermining the independence of the jury; improperly compromising the private and uninhibited character of jury deliberations; permitting the judge to improperly assist the

majority to impose their will on a "hold-out" juror or jurors; and infringing on the jury's nullification power. CALJIC No. 17.41.1 was given as follows: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based upon penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the court of this situation." There is no juror nullification right. (*People v. Williams* (2001) 25 Cal.4th 441, 463; *People v. Brown* (2001) 91 Cal.App.4th 256, 271.) As was recently pointed out in *People v. Cline* (1998) 60 Cal.App.4th 1327, 1335: "Courts have long recognized that 'a jury, in rendering a general verdict in a criminal case, necessarily has the naked *power* to decide all the questions arising on the general issue of not guilty; but it only has the *right* to find the facts, and apply to them the law as given by the court.' (*People v. Lem You* (1893) 97 Cal. 224, 228 [], . . . overruled on another ground in *People v. Kobrin* (1995) 11 Cal.4th 416, 427, fn. 7 [].) Because juries have no right to disregard the court's instructions, it is inappropriate to instruct juries on their power to nullify the law. [Citation.]" (Original italics; *People v. Nichols* (1997) 54 Cal.App.4th 21, 24-26.)

With those precepts in mind, we turn to the instructions in question. The California Supreme Court has held: "[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. [Citations.]" (*People v. Burgener* (1986) 41 Cal.3d 505, 538-539, disapproved on another point in *People v. Reyes* (1998) 19 Cal.4th

743, 750-754, 756; *People v. Holt* (1997) 15 Cal.4th 619, 677 [instructions are not considered in isolation.].) Much of CALJIC No. 17.41.1 reiterates other properly given instructions. For instance, CALJIC No. 1.00 instructed the jury to follow the law as it was given to them by the trial court. CALJIC No. 17.40 instructed the jurors to deliberate by discussing the evidence and instructions amongst themselves. Pursuant to CALJIC No. 17.42 the jury was properly instructed not to discuss or consider penalty or punishment or allow these subjects to in any way affect their verdict. (See *People v. Allison* (1989) 48 Cal.3d 879, 892, fn. 4; *People v. Hill* (1992) 3 Cal.App.4th 16, 46, disapproved on another point in *People v. Nesler* (1997) 16 Cal.4th 561, 582, fn. 5.) Finally, pursuant to CALJIC No. 1.03, they were instructed: "You must not independently investigate the facts or the law or consider or discuss facts as to which there is no evidence. This means, for example, that you must not on your own visit the scene, conduct experiments, or consult reference works or persons for additional information."

When the instructions are taken as a whole, there is no likelihood the jurors' duty to find guilt beyond a reasonable doubt was undermined by CALJIC No. 17.41.1. There was no likelihood the instructions as a whole misled the jurors. Defendant's contention to the contrary is without merit. (See *Boyde v. California* (1990) 494 U.S. 370, 380; *People v. Holt, supra*, 15 Cal.4th at p. 677; *People v. Burgener, supra*, 41 Cal.3d at pp. 538-539.) Finally, under any standard of reversible error, the alleged error was entirely harmless given the uncontradicted nature of the overwhelming and conclusive proof of guilt. (*Chapman v. California* (1967) 386 U.S. 18, 22; *People v. Watson* (1956)

46 Cal.2d 818, 836-837; see also *People v. Molina* (2000) 82 Cal.App.4th 1329, 1335-1336.)

[The balance of the opinion is to be published]

IV. DISPOSITION

The concurrent Penal Code section 186.22, subdivision (b)(1) term imposed as to count 2 is reversed. The cause is remanded solely to permit the trial court to exercise its discretion pursuant to Penal Code section 186.22, subdivision (g). If the court strikes the count 2 enhancement, it is to specify on the record and in the clerk's minutes why the interests of justice would best be served by such an order. The judgment is affirmed in all other respects.

CERTIFIED FOR PARTIAL PUBLICATION.

TURNER, P.J.

We concur:

GRIGNON, J.

ARMSTRONG, J.